**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO. 82 and 83 OF 2003**

**BEFORE:** **THE HON. MR. JUSTICE HARRISON, J.A.**
**THE HON. MR. JUSTICE WALKER, J.A.**
**THE HON. MR. JUSTICE COOKE, J.A.**

**R v. ONEIL LAWRENCE**
**CARL JAMES**

**Lord Gifford Q.C.** for Oneil Lawrence
**Carl James** (unrepresented)

**Tricia Hutchinson** for the Crown

**27th, 28th April, and July 30, 2004**

**COOKE, JA:**

The appellants Carl James and Oneil Lawrence were on the 28th March, 2003 convicted in the Home Circuit Court for the non-capital murder of Ian McGilvie on the 17th January, 2002. Each was sentenced to a term of life imprisonment and was to serve a period of 30 years before becoming eligible for parole. This judgment will deal firstly with the application for leave to appeal on behalf of Lawrence. In respect of this the original grounds were abandoned, and leave given to argue five (5) supplementary grounds. The application was granted and the hearing treated as that of an appeal.

Mud Town is an informal settlement to which entrance is gained from the Gordon Town Road in St. Andrew and at the relevant time

through the gateway of the Vocational Development Training Institute. The deceased Ian McGilvie operated a modest hardware shop in Mud Town. At about 6:30 p.m. on the 17th January, 2002, Calvin Grant, a brother of the deceased, was at his home in an area in Mud Town designated as Highlight View. He heard gunshot explosions. He hurried to the zinc fence which was to the front of his house and positioned himself so that he could see. He saw James coming through the door of his brother's shop with a gun in his hand. There is a dirt road leading from the Training Institute to where the hardware shop is situated. There is a 'track' off this dirt road which has to be traversed to enter Grant's premises. This track was to the left of the roadway entering Mud Town. After seeing James (who he knew as Buju) he ran across the dirt road. Parked there was a motor car. He stooped behind this car and he saw a person who he named as "Snakey" emerge from his brother's shop followed by V Lawrence. Both had guns. The three men ran off into "the hill". Grant immediately went to the hardware shop. There he saw his deceased's brother's body.

The deceased had received 8 gunshot injuries on the following areas of the body:

(i) the left back of the head;
(ii) lower left back of the head;
(iii) through the chin;
(iv) left lateral neck;
(v) lateral aspect of the left shoulder;
(vi) front of right elbow;
(vii) right lower front chest; and
(viii) the abdominal cavity.

Having seen his murdered brother, Grant forthwith went to the Papine Police Station and by approximately 7:00 pm made a report to Detective Constable Paul Edwards. They both returned to Mud Town.

Grant was the sole witness upon whom the prosecution relied. His credibility was the determinant factor in the jury arriving at its verdict. Grant was unlettered. As the learned trial judge told the jury he compensated for his want of verbal facility by demonstrations ( which this court has not seen but the jury had).

Grant testified that he knew James for some sixteen years from he was "a little boy." He knew where he lived, with one Paulette and their two children. Grant saw James on a daily basis in Mud Town. On the evening of the 17th January, 2002, James wore the hairstyle of a "rasta". Lawrence, he knew for some two years, since according to him, the former had left Jacks Hill to live in Mud town with his girlfriend "Wingy". Grant was accustomed to seeing Lawrence approximately 4 days per week. He had seen James and Lawrence together with "Snakey" at about mid-day on the very day of the murder. He was present when those three men were in conversation with the deceased. In their evidence both appellants said they were hailing acquaintances of Grant.

In respect of the lighting in the area of the hardware shop, Grant said there was a " a flood light" to the front of his brother's shop. Across the dirt road (the width of which allowed two cars to pass each other) there was a street light. There was also another street light some twenty

feet away from the shop. Detective Constable Edwards in his evidence supported the description of the lighting conditions given by Grant.

Grant said he saw the face of James both when he (Grant) was on his premises and when he stooped behind the car. He estimated one minute as the total time during which he saw James' face. As to Lawrence he saw his face only from behind the car and the estimate of time was some five seconds.

As already noted, Grant relied heavily on demonstrations. By one such demonstration it was estimated that from his premises to the hardware shop the distance was approximately fifty feet. When the measuring criterion was posed in terms of a cricket pitch, he said, the distance was not more than one cricket pitch. The officer Edwards estimated that the distance from behind the parked car to the shop was "23/24 yards". It will be recalled that the evidence of Grant was that this car was parked across the road from his premises. The defence contended that the distance from Grant's home to his brother's shop was considerably more than that given by the prosecution witness. Based on a statement given by Grant warrants for the arrest of James, Lawrence and "Snakey" were prepared and in due course, but for "Snakey", duly executed.

Both appellants denied involvement in the murder. Lawrence in his evidence said he was not in Mud Town at that time. James said he was, but he was at his business place where, in Jamaican parlance, he

operated a "cookshop". He was there when a customer told him of the incident. Bertram Cunningham gave evidence on behalf of Lawrence – the essence of which was that at the relevant time he saw three men leaving the hardware shop and these men were all fully masked. Lawrence was not one of these masked men.

The defence of both appellants challenged the lighting conditions as portrayed by Grant and officer Edwards. However, although counsel for James suggested to Grant that he was the author of a fabrication, the focus of both appellants at the trial was that because of the physical configuration of the dirt road and the presence of protruding light poles it would have been impossible for Grant to discern what he said he saw. Oral evidence to that effect was tendered by the defence.

The defence contended that the dirt road leading to the hardware shop from Grant's premises had "a corner", or "swing", or "bend" of such a proportion that would have prevented Grant from having any view of his brother's shop. Grant denied that the configuration of the dirt road was such that precluded a clear vision. Grant admitted that the road was not entirely straight but said that his capacity to see was unimpaired. The officer Edwards claimed that from he entered through the gateway of the Vocational Development Training Institute he could see the shop. On the night in question he went with Grant to where Grant was positioned at the various times and his view of the front of the shop from

both positions was clear. Edwards admitted there was "a slight curve" but this was not in anyway a handicap to a clear view.

The complaint in ground 1 is as follows:

> "1. The learned trial judge erred in law in restricting Defence Counsel at the trial in the questions which he was permitted to ask in relation to a photograph. Defence Counsel sought to put the photograph to the witness Calvin Grant in order to show that the scene of the crime could not be seen from the place where the witness was located. By her restrictions on Counsel's questions he was prevented from developing this issue effectively before the jury, and thereby a miscarriage of justice occurred."

Although it is somewhat lengthy, it is necessary to reproduce that portion of the transcript in its entirety which deals with the aspect of the case, in order to determine if there is merit in this complaint. It is hereunder:

"MR. SHECKLEFORD: There is something I ought to make an application to you about, and I do so now. I do have some photographs and I intend to make some application to your Ladyship some time and I am wondering if the witness could be shown the photographs to look at them and to say whether or not what is depicted therein represents what is the locale. May I add that these pictures were not taken at the same time or just after the incident. In fact they were taken one month ago.

HER LADYSHIP: That would be a year and a month approximately after the incident.

MR. SHECKLEFORD: Yes, ma'am.

HER LADYSHIP: You can show the witness but you can't ask him anything about them so I don't know what the point would be. You can show the witness anything but I

don't see you can ask him anything about them and I personally think photographs that were not taken contemporaneously with the occurrence of the incident may prove to be unfaithful to the terrain and to the whole scene. A lot of things happen in a year and a month and the trees grow, things are cut down, lightposts are planted and all sorts of things can happen, so that there is no guarantee that the position of anything that is there would be the same as it was at the time of the incident.

MR. SHECKLEFORD: Yes, ma'am. I would none-the-less wish to show him and I would show him one picture. I have pictures but I would just show him one.

MR. BRYAN: M'Lady, the crown is objecting to those pictures being shown to the witness.

HIS LORDSHIP: He can show the witness anything he wants to, you know, he can show him but where he will go from there is another matter.

MR. BRYAN: And that is my fear, M'lady, and although your Ladyship had indicated certain things I really don't see any point in respect to the witness being shown the picture for showing it sake, you know, and as to what goes on from there, what is the point of showing the witness without anymore? Because I really would object to counsel if counsel would seek to take it any further.

HER LADYSHIP: What is the object Mr. Sheckelford, of showing him this picture that you can't ask him anything about?

MR. SHECKLEFORD: Later on - it is not in evidence but later on I hope to make an application which your Ladyship may accept or

reject. I have certain instructions and I feel obliged to put what I have.

HER LADYSHIP: How are you going to put it in? By what means? You are going to show him the photograph and then do what?

MR. SHECKLEFORD: I am going to show him the photograph and I was hoping that I would be able to ask him if that photograph was an accurate representation of the physical state of what he sees in the picture, the physical state of what he sees in the picture, whether the car is in the same place, the posts in the same place, the fence in the same place, the road in the same place. That's all I would ask him, one question – does it represent what he knows the road and place to be. That is all I was hoping to do.

HER LADYSHIP: On the 17th of January, 2002?

MR. SHECKLEFORD: On the 17th of January, 2002, m'Lady. That is all, nothing more; and one picture, no more than one.

HER LADYSHIP: Show him.

MR. SHECKLEFORD: m'Lady.

HER LADYSHIP: Show him.

MR. SHECKLEFORD: Yes, M'lady.(Item shown)

HER LADYSHIP: Don't do that.

MR. SHECKLEFORD: It was my colleague I was showing.

HER LADYSHIP: Yes, but there are those people there. It is not in evidence and should not be seen by anybody.

Yes, we have been shown the photograph. Ask him the question.

MR. SHECKLEFORD: Yes, ma'am.

Q. You have seen that photograph, Mr. Grant

A. Sir, it don't look like...

Q. It don't look like?

A. Yes, There is some more bush like

HER LADYSHIP: What are you saying about the photograph?

THE WITNESS: I am saying the photograph, on the side where I could look and see mi brother shop there is a lot of...

HER LADYSHIP: Is the same? Is a true photograph of how the place was at the time that you went...

THE WITNESS: No, Ma'am.

HER LADYSHIP: ...to look at your brother's hardware shop on the 17th of January? That is the question Mr. Sheckleford should be asking and I have to be asking it. Is that photograph what...

THE WITNESS: No ma'am.

HER LADYSHIP; Is that photograph what was there on the 17th of January, 2002 at 6:30 p.m. when you heard those shots? Is that how the place did stay?

THE WITNESS: No ma'am.

HER LADYSHIP: Right, thank you.

MR. SHECKLEFORD: Very well, ma'am, nothing further.

HER LADYSHIP: Yes, Mr. Grant, thank you
(Witness withdraws 11.59 a.m.)

HER LADYSHIP: is it anticipated that anybody will

require him again further?

MR. BRYAN: I won't m'Lady.

HER LADYSHIP: You will be able to contact him if he is required by the defence.

MR.SHECKLEFORD: m'Lady, may I ask that the photograph be marked?

HER LADYSHIP: I wish you would put it down.

MR. SHECKLEFORD: I am sorry. That the photograph be marked, m'Lady.

HER LADYSHIP: Photograph be marked?

MR. SHECKLEFORD: Yes, ma'am, be marked.

HER LADYSHIP: Mark it 'A', 'B'?

MR. SCHEKLEFORD: Whatever mark, m'lady, that that is the same photograph that was shown to the witness marked for identify, m'Lady.

HER LADYSHIP: Photograph marked 'A' for identity.

Yes, Mr. Grant, you are excused, you may go. You will be contacted if you are required further.

THE WITNESS: Yes."

A perusal of this excerpted portion of the transcript does not support the contention that Counsel for Lawrence was in some way restricted. He was not. There was no ruling by the learned trial judge as was asserted in the written submissions that "no further questions could be asked". The fact that the learned trial judge permitted the

photograph to be marked for identity indicated that the issue of admissibility of the photograph was not at an end. It was submitted that:

> "If the witness had agreed that the location of the car, the fence, the posts and the road were unchanged, counsel would have been able to submit that the witness could not have seen what he said he saw. The fact that more bush might have grown did not affect the case which counsel sought to make. Counsel would have been entitled to test the veracity and reliability of the witness by reference to the photograph, and to have the photograph exhibited for the assistance of the jury."

As already said, Counsel for Lawrence was not restricted from asking the questions alluded to in this argument. It is more than a little curious as to why instead of the use of photograph(s) there was no application to visit the locus in quo. It is common knowledge that in informal settlements such as Mud Town, which are not subject to any supervision as to development there are changes in such an area on an ad hoc basis. Further we now live in a time of breathtaking technological innovation of which photography is not exempt. This is not to say that the photograph which was marked for identity showed a distorted representation. It is to say that the court must exercise great caution in determining the admissibility of photographs. For example, what was the photographer's position when the photograph was taken viz-a-viz the total surroundings and in particular, the vantage point of the identifying witness when he said he saw the accused? Critically such photograph must be an

accurate representation of the scene not only as to the topography but also as to changes natural or man-made of any kind which was on the land subsequent to the relevant time – which is at the time of the murder. Generally, similar considerations would obtain as to the criteria for the admissibility of photographs as for a visit to the locus in quo. In respect of the principles to ground an application for a visit to a locus in quo see ***R v Warwar*** [1969]15 W.I.R. 298; ***R v Kirk Manning*** SCCA No. 43/99 (unreported, delivered March 20, 2000).The pre-requisite foundation for the admissibility of the photograph was absent. In any event there was no application to the court for its admission. This ground fails. There was no miscarriage of justice. Ground 2 was as follows:

> "2. The fair trial of the Appellant was prejudiced by the evidence of Detective Constable Edwards that he had seen the Appellant in a group of men including two gunmen, in the same area where the crime had been committed. By giving this evidence the said officer sought to allege against the Appellant that he had on a separate occasion been seen in a group with gunmen. Such evidence was inadmissible to prove the charge before the jury but was highly prejudicial against the Appellant."

Reference will now be made to the transcript as is relevant to the evidence of which the complaint is made. It is recorded thus:

Q. "At about 3:00 pm. that 13th of March last year, where were you?

A. I was on operation in the Highlight View area.

Q. is that also the same Mud Town you are speaking about?

A. Yes, sir, with other police personnel.

Q. Were you alone on that operation?

A. No. sir, there were several other police.

Q. Did anything happen whilst you were in that area at that time?

A. Yes, sir.

Q. Yes, can you tell the court?

A. While on an operation there I saw a group of about five, two, gunmen right, I cannot recall how many of them but there was a group of men and in that group of men, I saw the accused man, Oneil.

HER LADYSHIP: Yes

THE WITNESS: I went to him, held on to him , and asked him if he is not Oneil. I was surprised seeing him there.

HER LADYSHIP: Yes.

THE WITNESS: I then cautioned him."

The record reveals that there is this cross-examination by Counsel for Lawrence in respect of the excerpted portion above:

"Q. Sir, you said you saw the accused man up at Mud Town, Highlight View on the 13th of March?

A. Yes sir.

Q. Standing among a group of persons, you say?

A. Yes, sir.

Q. Was this at a place that he was directly behind the hardware, sir?

A. At the shop. Not exactly in line.

Q. But behind it?

A. Yes, sir.

Q. Did he make any effort to run when you saw...

A. He could not run.

Q. I did not ask you that, sir. Did you or did you not see that, sir?

A. No, sir.

Q. That place that you saw him was at a place where it was dark? Light there.

Q. Yes, sir."

It would seem that the evidence of Detective Constable Edwards as to the circumstances in which he apprehended Lawrence did not occasion even a pause in the proceedings. Certainly, counsel for Lawrence did not indicate to the Court the slightest discomfiture that there was prejudice to his client as a consequence of the evidence which had been adduced. He, perhaps, not unreasonably, thought that the mention of "two gunmen" was merely part of the scenery. Hence the subsequent cross-examination. If prejudice there was, that cross-examination would have only served to reinforce that prejudice. Despite those observations there has to be resolution as to whether or not the evidence of Detective Constable Edwards that Lawrence was in a group which included "two gunmen" was such that precluded Lawrence from having a fair trial. In this regard there are two issues. The first is an

assessment of whether in respect of a fair trial the impugned evidence can be categorised in respect of prejudice, as negligible, possibly, or obviously real. This assessment will, of course be determined within the context of the particular case. If it is negligible, that is, it technically contravenes a purist's criterion without more- then it can be ignored. The second issue is as to the course to be adopted when the risk of prejudice is other than negligible. If there is an obvious real danger then the jury ought to be discharged. The perplexing difficulty attends the "possibly" category. What should the trial judge do in such a particular case? It is a decision to be made in the midst of the unfolding drama on the trial stage. Should such trial judge, if no objection is taken, adopt the stance of passive indifference and preside over the case as if the unsolicited offending evidence had not occurred? Should the trial judge invite submission from counsel as to whether or not the jury should be discharged? This is left to the exercise of the trial judge's discretion with which this court will not lightly interfere: see ***R v Weaver*** [1967]1 All ER. 277, ***McClymouth (Peter) v. R*** [1995] 51 W.I.R. 178. In this case the trial judge remained impassive.

The central issue in this case was that of identification. It was submitted that :

> " This reference to 'two gunmen' by the officer was a serious irregularity. It clearly conveyed to the jury that the message that the applicant was a man who consorted with gunmen...

> The evidence rests on one witness only. The witness claimed to have seen the co-accused James for about a minute, but the applicant only for five seconds. So labelling the applicant as a man who consorted with gunmen may well have been decisive in tipping the scale in favour of conviction."

To say that, the impugned evidence "conveyed the message" that the "applicant" was a man who consorted with gunmen is at best hyperbolic. This is so especially as the officer expressed surprise at seeing the applicant in such a group of persons. The evidence about which complaint is made was unfortunate and ill-advised. It was not specifically elicited by counsel for the prosecution. It cannot be said that this piece of unsolicited evidence would certainly have adversely affected the credibility of the identifying witness. In the circumstances of this case and particularly the conduct of counsel for Lawrence in respect of this bit of evidence, it was proper for the learned trial judge to have ignored it. This evidence cannot be classified as "devastating" as in ***McClymouth*** (supra) where there was an obvious real danger so that the jury must be discharged. If the learned trial judge had made reference to this evidence there would have been the risk of impressing on the minds of the jury that Lawrence was a man who consorts with gunmen when the evidence did not indicate that this was so. The best, course, as was adopted in this case was for all parties – prosecution, defence and learned trial judge, to abstain from making any reference to that evidence at all. This was the approach suggested in ***James Wright*** (1934)

25 Cr. App. R. 35 at p. 41. Admittedly, this approach was in respect of evidence that was described as "harmless and innocent". However, this same approach is recommended, where as in this case, reference to the impugned evidence may well have resulted in harm to the accused. This ground of appeal fails. There was no miscarriage of justice.

Ground 3 was in this formulation:

> "3. The failure of the police to hold an identification parade fatally impaired the evidence of the identifying witness, and in the circumstances caused a miscarriage of justice which the learned judge ought to have averted by withdrawing the case from the jury."

It was argued that an identification parade was required because the identifying witness had named a person called Neil and the officer had arrested a man named Oneil. No second name had been given by Grant. It was submitted that it was essential in the interests of justice and fairness, for the witness to be given the opportunity of seeing whether on a parade he was able to identify the suspect Oneil as the man he claimed to have seen and knew as Neil. There was never any dispute that the person called Neil by the identifying witness was the then accused Oneil Lawrence. This was accepted by counsel for Lawrence. It could hardly have been otherwise in view of the evidence of the identifying witness as to his prior knowledge of Lawrence. ***R v Goldson (Irvin) and Devon MaGlashan*** (2000) 56 W.I.R 444, received the attention of the Judicial Committee of the Privy Council. It is a case from this jurisdiction. In its advice Lord Hoffman said at p.449- I to p. 450 a:

> "Their lordships consider that the principle stated by Hobhouse LJ in ***R v Popat*** [1998]2 Cr. App. Rep 208, at p. 215 that in cases of disputed identification 'there ought to be an identification parade where it would serve a useful purpose', is one which ought to be followed. It follows that, at any rate in a capital case such as this, it would have been good practice for the police to have held an identification parade unless it was clear that there was no point in doing so. This would have been the case if it was accepted, or incapable of serious dispute, that the accused were known to the identification witness. "

The application of this principle to this case indicates that there was "no point" in holding an identification parade. The credibility of the identifying witness was the critical issue to be resolved. The jury was suitably directed as to that. This ground also fails.

There was also ground 4 which was in these terms:

> "4. The learned trial judge failed to give adequate directions to the jury on the issue of identification, in that she (a) failed to direct the jury that the failure to hold an identification parade was a weakness in the identification, (b) failed to give them adequate guidance in a case where in nearly every material particular - distance, lighting, obstruction of view, prior knowledge of the Appellant – there were conflicts of evidence between the witness Calvin Grant and that of other witnesses."

This ground was notionally pursued. By this time, the submission as to the holding of an identification parade had already been made. Further, the guidance given by the learned trial judge as to how the jury should approach the issue of identification cannot be faulted. This ground fails.

The learned trial judge determined that both Lawrence and James should each serve a period of 30 years imprisonment before becoming eligible for parole. It was submitted on behalf of Lawrence in ground 5 that this period of incarceration before becoming eligible for parole was manifestly excessive. It was said that Lawrence was a young man (he was 22 years old at the time of the murder) and that efforts at rehabilitation in our prison was meeting with general success. Therefore, it was likely that Lawrence would have had the benefit of rehabilitative process long before 30 years had elapsed. Accordingly the period of imprisonment was manifestly excessive.

The view that the rehabilitation process is producing such beneficial results, while no doubt pleasing to the ears of our Correctional Services, is not one of widespread currency. No statistical data was produced to the court to substantiate this proposition. Of course, merely to say that Lawrence will be rehabilitated, if at all, within any estimated time span is at this juncture, entirely speculative. There is no basis for any such conclusion. In any event this murder was horrific. In our country, today, the alarming incidence of murder is of grave concern. In cases, such as this, a very long term of imprisonment before eligibility for parole is warranted. The emphasis in these cases should be on the deterrent and punitive aspects of sentencing. Therefore, the determination by the learned trial judge that 30 years should elapse before eligibility for parole is not manifestly excessive.

Carl James was un-represented. A look at the records indicated on the Criminal Form B(1) which pertains to an application for leave to appeal against conviction or sentence that "Lord Gifford Thompson Bright " was the firm of attorneys-at-law who would be representing this applicant. However, there appears to be, at least some misunderstanding as to representation. Lord Gifford Q.C. stated that he only represented Oneil Lawrence.

The grounds of appeal listed in the Criminal Form B(1) were:

(a) (1) "Mis-identity by witness" in that he was wrongfully identified.

(b) (2) "Lack of evidence" in that there was no forensic evidence to link the applicant to the crime and;

(c) (3) Unfair trial in that the identification was a fleeting glance in poor lighting conditions.

As in the case of Lawrence, the application of James for leave to appeal was granted and the hearing was treated as an appeal.

As it was with the case against Lawrence, so it was with James. The prosecution relied entirely on the credibility of the evidence of visual identification that came from Calvin Grant. James was known to the identifying witness for a much longer time than Lawrence. He also saw him on a daily basis. Grant spoke to having more opportunity of recognizing James than Lawrence. The directions of the learned trial judge in respect of the identification evidence of Grant in respect to

James cannot be subject to criticism. This judgment has already discussed the issues of the topography and the admissibility of a photograph. No more needs to be said, except that the submissions in respect of those issues having failed on behalf of Lawrence would also fail as regards James. The case against James was decided on the credibility of the identifying witness. The jury by this verdict, not unsurprisingly accepted him as an honest, convincing and not mistaken witness – and as a witness who has not fabricated his account of what and whom he saw.

The appeals are dismissed. The convictions and sentences are affirmed. The sentences are to commence on the 28th June, 2003.